No. 91-1909

Supreme Court, U.S.
FILED
MAY 26 1992
OFFICE OF THE CLERK

In The Supreme Court of the United States
October Term, 1991

DR. PAUL MAGUIRE, D.N., DR. RODOLFO T. ABIERA, D.N. and DR. ANNE F. ADUKAITIS, D.N., et al,

Petitioners,

v.

ROBERT C. THOMPSON, Acting Director of the Department of Professional Regulation, State of Illinois (and Successor in Public Office to Stephen F. Selcke) and DEPARTMENT OF PROFESSIONAL REGULATION, State of Illinois,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

GARY L. STARKMAN
Counsel of Record
ROSS & HARDIES
150 N. Michigan Avenue; Suite 2500
Chicago, Illinois 60601
(312) 558-1000

MARJORIE E. MCCOLLOM
CANTWELL & CANTWELL
30 N. LaSalle Street; Suite 2424
Chicago, Illinois 60602
(312) 372-3000

Counsel for Petitioners

ARMI®
Legal Copies of America (312) 332-2764

50

QUESTION PRESENTED

Whether the standard of review of equal protection and due process challenges to state social and economic legislation has become so deferential as to render it meaningless; and, more specifically:

Whether a hypothetical, court-created justification for state social-economic legislation is sufficient to provide a "rational basis" upon which to sustain the law against constitutional challenge *without a hearing* when the record affirmatively shows that the law:

(1) abolished a healing arts profession that had been recognized for over eighty years to perform quality health care services;

(2) criminalized the practice of a recognized healing art whose practitioners had been trained at colleges specifically authorized by the state to teach the regimen and grant a degree in the profession; and

(3) followed a legislative history specifically disclosing that (a) the state legislature did not investigate public health concerns, review any scientific, medical or social data or even receive any testimony in the bill's house of origin; and (b) the bill's sponsor did not intend to abolish the profession.

INTERESTED PARTIES

The following listed parties have an interest in the outcome of the case:

A. Petitioners are all individual Doctors of Naprapathy:

Paul Maguire
Rodolfo T. Abiera
Anne F. Adukaitis
Phyllis L. Banks
Salvatore P. Basso
Ted Bellos
Simon Bernstein
Karen Bruneel
Robert R.Burg
Harold B. Cassidy
Wayne R. Cichiwscz
Alan Cochin
Helen Collins
Elaine De Della
Guy F. De Vita
Anjean Groen Egan
Norman Esseraan
Larry D. Felts
Anthony J. Filichicchia
John Fletcher
Linda Dudek-Francis
Ralph Francis
Tom Gagnon
Dewitt Garrett
John Gehring
Richard Gibas
Stanley Goworoski
Gordon Greenwood
Asar Ha-Pa
Kenneth Hansen
Elsie A. Hart
Lynn K. Hinkel
Roger Hockenberry
Madonna M. Hogan
Verl Hunter
James E. Hutchins
Larry Jackson
Meg Jorgenson
Edward R. Karp
Joseph Kosar, Jr.
Edward D. Koziol
Carcotta E. Krcek
Lenard L. Kretschmer
Roy Krueger
Ruth T. Lamaster
Stephen J. Lampert
Darrel L. Larkin
Joseph Laughlin
Barbara Lenihan-Wasiel
Edward Lindren
Heather Malinowski
Christopher Malinowski
Mario Maretta
Glen T. Matejka
Evelyn Measimer
Charlene M. Michel
Ronald V. Miner
Betty Moore
Deborah Morrison
William Morse
Patricia Mulloy
Alfred L. Neloms
Dana Shepard Nineberg
Patrick Nuzzo
Anita M. Ogle
Henry Ogle
Jeannine T. Olge
Alexanne Osinski

Ron Pellegrini
Salvatore Peluso
Mark T. Peterson
Alberto Pick
Lynn Pilot
Janet Terese Pomykala
Antonio Pugliese
James Quinn
Jeanne M. Rapacz
Warren Ray
Melanie DugganReschke
Richard A. Reschke
Mary Ellen Reschke
Irene Rudawski
Dennis Scharf
Gordon Scherzer
James F. Schleichert
Robert M. Schultz
George H. Secrest
Richard Sedlak
Ronald Sidney
J. Dawn Silver
Kathleen Skoli
Anna Skorpen
Dorothy Skuby
George B. Skuby
Silbernail Smith
Lee A. Sodaro
Richard F. Soppa
Maura Soto
Elaine Stocker
George G. Stretch
E. Roger Szalowski
Irvin S. Tarrson
Thomas F. Thomas
Robert A. Urbanek
Gordon Violette
Kyle D. Wade
Richard Warren
Louis Watkins
Morris Williamson
Raymond M. Webster
Dan M. Young
Jerry Zajak
Karen Higgins-Zuck

B. Respondents are official representatives of the State of Illinois:

Robert C. Thompson, Acting Director of the Illinois Department of Professional Regulation
Illinois Department of Professional Regulation

TABLE OF CONTENTS

QUESTION PRESENTED i

INTERESTED PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

I. REASONS FOR GRANTING THE WRIT 5

II. THE MERITS 8

A. DUE PROCESS 8

B. EQUAL PROTECTION 11

CONCLUSION 14

APPENDIX:

A. OPINION OF THE COURT OF APPEALS 1a

B. OPINION OF THE DISTRICT COURT 1b

C. JUDGMENT OF THE COURT OF APPEALS 1c

D. ILL.REV.STAT. ch. 111, 4400-11 ..... 1d

TABLE OF AUTHORITIES

Cases *Page*

American College of Obstetrecians v. Thornburgh, 737 F.2d 283 (3d Cir. 1984), *aff'd.*, 476 U.S. 747 (1986) 9

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 5, 11, 12, 13

City of Dallas v. Staglin, 490 U.S. 19 (1989) 5

Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) 6

Dandridge v. Williams, 397 U.S. 471 (1970) 5

Dent v. West Virginia, 129 U.S. 114 (1898) 10

Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) 7, 11, 13

Dept. of Agriculture v. Murry, 413 U.S. 508 (1973) 7

England v. Louisiana State Board of Medical Examiners, 263 F.2d 661 (5th Cir. 1959) 6, 9-10

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) 11

James v. Strange, 407 U.S. 128 (1972) 5

Jefferson v. Hackney, 406 U.S. 535 (1972) 5

Jimenez v. Weinberger, 417 U.S. 628 (1974) 7

Kadrmas v. Dickenson Public Schools, 487 U.S. 450 (1988) 5

Knight v. Tape, Inc., 935 F.2d 617 (3d Cir. 1991) 6

Lindsey v. National Carbonic Gas Co., 220 U.S. 61 (1911) 5

Lochner v. New York, 198 U.S. 45 (1905) 5

Margaret S. v. Treen, 597 F.Supp. 636 (E.D. La. 1984), *aff'd.*, 794 F.2d 994 (5th Cir. 1985) 9

Mathews v. Lucas, 427 U.S. 495 (1976) 5, 11

Metropolitan Life Insurance v. Ward, 472 U.S. 14 (1985) 11

McGuire v. Thompson, 957 F.2d 374 (7th Cir. 1992) 1, 3, 4, 9

New York State Club Ass'n. v. City of New York, 487 U.S. 1 (1988) 7, 12

Oliver v. Morton, 361 F.Supp. 1262 (N.D.Ga. 1973) 9

Page

Pahn v. Virginia, 806 F.2d 516 (4th Cir. 1986) 6

People v. Love, 298 Ill. 304 (1921) 13

People v. Schaeffer, 310 Ill. 574 (1924) 13

Potts v. Illinois Department of Registration and Education, 128 Ill. 2d 322, 518 N.E. 2d 1140, *cert. denied*, 493 U.S. 992 (1989) 2-3, 8

Plyler v. Doe, 457 U.S. 202 (1982) 11

Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985) 8

Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 5

Schware v. Bd. of Bar Examiners, 353 U.S. 232 (1957) 8, 10

United States v. Carolene Products Co., 304 U.S. 144 (1938) 6

United States Railroad Retirement Bd. v. Fitz, 449 U.S. 166 (1980) 5, 7

United States v. Sahhar, 917 F.2d 1197 (9th Cir. 1990) 6

Vance v. Bradley, 440 U.S. 93 (1979) 7

Washington v. Harper, ___ U.S. ___, 110 S.Ct. 1028 (1990) 8

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 7

Williams v. Lee Optical Co., 348 U.S. 483 (1955) 5, 9-10

Williams v. Vermont, 472 U.S. 14 (1985) 11

Youngberg v. Romero, 457 U.S. 307 (1982) 8

Zobel v. Williams, 457 U.S. 55 (1982) 11

Statutes

42 U.S.C. §1983 3

Ill.Rev.Stat. ch. 111, §4400-11 .....1, 2

Other Authority

Comment, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 Harv.L.Rev. 1363 (1990) 8

No.

In The
Supreme Court of the United States
October Term, 1991

DR. PAUL MAGUIRE, D.N., DR. RODOLFO T. ABIERA, D.N. and DR. ANNE F. ADUKAITIS, D.N., et al,

Petitioners,

v.

ROBERT C. THOMPSON, Acting Director of the Department of Professional Regulation, State of Illinois (and Successor in Public Office to Stephen F. Selcke) and DEPARTMENT OF PROFESSIONAL REGULATIONS, State of Illinois,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals is officially reported as *McGuire v. Thompson*, 957 F.2d 374 (7th Cir. 1992), and is reproduced as Appendix A at pages 1a through 7a. The unreported opinion of the district court as to the merits is reproduced as Appendix B at pages 1b to 14b.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on February 26, 1992 (Appendix C; page 1c). No petition for rehearing was filed. This petition for certiorari was filed within 90 days of the entry of judgment.

STATUTE INVOLVED

The Illinois Medical Practice Act of 1987, Ill.Rev.Stat. ch. 111, 4400-11, is reproduced as Appendix D at pages 1d to 7d.

STATEMENT OF THE CASE

Petitioners are all certified doctors of naprapathy, a recognized health care system concerned with promoting physical well-being by manipulating connective tissue to relieve neuro-vascular interference. They obtained their degrees from institutions authorized since 1908 by the Illinois Board of Education (and its predecessors) to teach the science of naprapathy and grant doctor of naprapathy degrees. Historically, under the Illinois Medical Practice Act, licensure was not required in order to practice a healing art that did not involve prescribing drugs or engaging in surgery; and, from the early twentieth century forward, naprapaths continuously provided quality health care without objection and without adverse incident.

In 1987, the Medical Practice Act was amended. One provision of that amendment made the right to obtain a limited license to treat human ailments without drugs or operative surgery contingent on graduation from a chiropractic college. Ill.Rev.Stat. ch. 111, §4400-11(B) (App. 6d-7d). This had the effect of converting the historically recognized practice of naprapathy into a criminal offense.

The legislative history of the 1987 amendment demonstrates that the Illinois General Assembly did not examine any scientific, medical or social data. No investigation was undertaken with respect to public health concerns. No analysis of the respective treatment regimens of those who practice medicine without drugs or surgery was completed. No witnesses testified in committee in the house origin for the legislation embodying the 1987 Medical Practice Act; and the bill's sponsor specifically believed that legislation independent of the Act was going forward to recognize and license naprapaths.

The provision was quickly declared unconstitutional as applied to naprapaths in the lower state court. However, when the amendment came before the Illinois Supreme Court on direct review, the record was devoid of a factual demonstration of the nature and history of naprapathy, its historic recognition in Illinois or the legislative history of the Act. Accordingly, in *Potts*

v. Illinois Dept. of Registration & Education, 128 Ill.2d 322, 538 N.E.2d 1140, *cert. denied*, 493 U.S. 992 (1989), the Court was forced to rely on presumptions in lieu of either facts or legislative history in sustaining the constitutionality of the Act against due process and equal protection challenges.

Because of the absence of any semblance of a factual presentation in the state courts, the instant case was filed by naprapaths who were not parties to the *Potts* case.[1] The complaint sought declaratory and injunctive relief under 42 U.S.C. §1983 seeking to invalidate the application of the 1987 amendment to naprapaths on federal due process and equal protection grounds.[2]

The complaint alleged a factual scenario that had been presented to neither the legislature nor the courts on the state level: the standards of the profession, the long-time recognition of its scientific and educational value in Illinois and the fact that it has never posed a threat to public health and safety, but instead had contributed to quality health care, were all set forth in detail. In this manner, the complaint presented the historical facts that actually occurred in order to rebut the incorrect result of the presumptions applied by the state court to sustain the Act. Based on this complaint and the relevant legislative history, petitioners sought to show that a constitutional deprivation arises from legislation that abolishes a profession and criminalizes conduct that its members were trained at state chartered institutions to perform, when the practice of the profession has never been alleged to contravene the best interests of public health care and the state legislature never intended to make - or even contemplated making - the practice illegal.

Acting on the state's Fed.R.Civ.P. 12(b)(6) motion, the district court dismissed the complaint without a hearing, finding:

---

[1] As an alternative basis for its ruling, the district court found that res judicata precluded this action because the *Potts* plaintiffs were "virtual representatives" of plaintiffs at bar. (App. 5b-10b). In light of its disposition on the merits of the constitutional claim, the Seventh Circuit did not reach this issue. 957 F.2d at 379 (App. 7a).

[2] The complaint also sought relief under the due process and equal protection clauses of the Illinois Constitution, but those claims were specifically waived on appeal. 957 F.2d at 376 n.1 (App. 3a).

> A court need only determine whether there are "plausible," "arguable" or "conceivable" reasons justifying the legislative restrictions. * * * If the court can hypothesize a legitimate purpose which would justify distinctions made in the state's regulatory scheme, the case is properly dismissed.
>
> * * *
>
> It is conceivable that the legislature concluded that the philosophy or course of study of the naprapathic colleges does not sufficiently prepare their graduates to diagnose and treat human ailments. While it is possible that this decision will exclude competent practitioners from the practice of naprapathy, such overbreadth does not require a finding that the provision is irrational. The rational basis test does not require that the legislation be perfectly tailored to serve its legitimate end, and the federal courts long ago removed themselves from the business of second-guessing the legislature. (App. 11b-13b).

In sustaining this ruling, the Seventh Circuit painted with an even broader theoretical brush:

> Under the law as we perceive it and demonstrate in this opinion, it is not necessary to hold an evidentiary hearing either before the legislature or before the trial court to determine whether in fact such circumstances have existed nor is it necessary to demonstrate that the legislature in fact specifically articulated one or another such reasons as the basis for its action. It is enough under the cases to conclude as a matter of law that a legislature could have accepted such reasons and it is only necessary that the courts determine as a matter of law that they are rational in order to uphold the legislative action.

957 F.2d at 378 (App. 5a-6a). The breadth of this ruling literally insulates all state social and economic legislation from federal constitutional challenge, regardless of the magnitude of the property interest involved, regardless of the true state of facts and regardless of the legislative record.

I. REASONS FOR GRANTING THE WRIT

For more than a half-century, this Court has paid abiding deference to the legislative judgment with respect to state social and economic laws. In order to satisfy due process, the legislation need only have a rational relationship to a legitimate end of government. In order to satisfy equal protection, a classification created by the legislation need only meet the same standard. Despite an abundance of precedent on the subject,[3] the Court has acknowledged that the application of the rational basis test has not run smooth.[4]

This case is not suggested as a vehicle for returning to the substantive due process era characterized by *Lochner v. New York*, 198 U.S. 45 (1905), when state laws were routinely invalidated "because they may be unwise, improvident or out of harmony with a particular school of thought." *Williams v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). Nor is its resolution contingent upon a change in the tiered analysis under which rational basis claims are subjected to judicial scrutiny. *Compare City of Dallas v. Stanglin*, 490 U.S. 19 (1989) *with City of Cleburne*, 473 U.S. at 451 (Stevens, J., concurring); *Railroad Retirement Board*, 449 U.S. at 180-81 (Stevens, J., concurring).

While various aspects of these issues are relevant to any "rational basis" analysis, the record in this case accepts the most deferential and forgiving level of scrutiny. Nonetheless, even at this level, the "scrutiny by which [the legislature's] showing is to be judged is not a toothless one. . . . " *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). In this case, however, the court removed the last incisor by hypothesizing a "rational basis" as a matter of law when, if given a hearing, petitioners could have shown

---

[3] *See, e.g., Kadrmas v. Dickenson Public Schools*, 487 U.S. 450 (1988); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *James v. Strange*, 407 U.S. 128 (1972); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61 (1911).

[4] "The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under the equal protection clause." *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 176 n.10 (1980).

that, as to them, no conceivable justification for the legislation actually existed.

Because of this, the decision falls squarely within the scope of Sup.Ct.R.10(1)(a) in two ways. First, it aligns the Seventh Circuit with those courts that accept hypothetical justifications for legislation in lieu of evidentiary hearings based on their perception that "[t]he rational basis test is, more or less, a judicial rubber stamp."[5] This is in sharp contrast to those circuits which hold that, despite a "conceptual" or "hypothetical" justification for a law, a party is entitled to a hearing to demonstrate the absence of a rational basis.[6]

Second, the Seventh Circuit's decision and the trend it exemplifies represent a departure from settled law. Admittedly, since *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938), "the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests on some rational basis. . . ." However, under *Carolene Products* and its progeny, the presumption could be overcome if "facts were made known . . . as to preclude the assumption that [the legislative judgment] rests upon some rational basis within the knowledge and experience of the legislators." 304 U.S. at 152. Likewise, ". . . the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."

---

[5] *United States v. Sahhar*, 917 F.2d 1197, 1201 n.5 (9th Cir. 1990); *see also Knight v. Tape, Inc.*, 935 F.2d 617, 627 (3d Cir. 1991).

[6] *See, e.g., Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991) (". . . the district court on remand should determine whether the City has a rational basis for treating the Church differently . . . ."); *Pahn v. Virginia*, 806 F.2d 516, 522-23 (4th Cir. 1986) (although court "can hypothesize . . . a rational justification for different treatment of church-affiliated schools based on their locations * * * this case comes to us not hypothetically but with a record" and remand necessary to determine whether law satisfies "minimum rationality"); *England v. Louisiana State Board of Medical Examiners*, 259 F.2d 626, 627 (5th Cir. 1958) (chiropractors entitled to "an opportunity to prove that the state's denial of their claimed right to practice an allegedly useful profession is so arbitrary and unreasonable as to amount to a denial of due process or the equal protection").

See also New York State Club Ass'n. Inc. v. City of New York, 487 U.S. 1, 17 (1988) ("plaintiff can carry this burden by submitting evidence to show that the asserted grounds for the legislative classification lack any reasonable support in fact, but this burden is nonetheless a considerable one"); *Vance v. Bradley*, 440 U.S. 93, 111 (1979) ("those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker").

Thus, this Court's precedent creates the standard under which a law may be challenged on "rational basis" grounds and imposes a heavy burden on the plaintiff to submit evidence to meet the standard. On the other hand, the Court has refused to accept "flimsy or implausible justifications for legislative classification, proffered after the fact by government attorneys." *Railroad Retirement Board*, 449 U.S. 166, 184 (Brennan, J. dissenting).[7] "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975).

All of these historically recognized considerations for reviewing legislation under the unadulterated rational basis test are inconsistent with the growing trend, as exhibited by the opinion below, to hypothesize a justification (or accept the state's conceptualization) and exalt speculation above fact. This case provides an ideal record upon which to restore a principled basis for the constitututional analysis of state economic and social legislation under the reasonable basis test. Without this Court's intervention, there is a continuing risk that those courts that view the rational basis test as a "rubber stamp" will increase and that, as this case exemplifies, state legislation will become literally immune from federal constitutional scrutiny.

---

[7] Although the graphic quote that fits this case was articulated in dissent, Justice Brennan supported it by prior decisions that exemplified the concept. *See, e.g., Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973); *James v. Strange*, 407 U.S. 128 (1972).

Because there is no potential reward for assuming that continuing risk,[8] certiorari should be granted.

II. THE MERITS

A. DUE PROCESS

Substantive due process shelters those with a constitutionally protected liberty interest from arbitrary and unreasonable government interference.[9] The right to practice the profession for which one has been educated and trained represents a protected liberty interest under both federal and state law. *See Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 238 (1957); *Potts*, 128 Ill.2d at 332, 538 N.E.2d at 1144 ("naprapaths have a property right in the practice of their profession and that that right is entitled to due process protection"). The due process right to practice one's profession may be abridged only to the extent that the state has a "rational basis" for so doing.

We acknowledge the heavy burden imposed upon a party seeking to invalidate state legislation of this type on federal constitutional grounds. However, in this case, the Illinois General Assembly abbrogated the right of qualified naprapaths (who were graduates of a state-chartered college) to practice a healing art that has been recognized in Illinois for over 80 years without intending to do so and without conducting any form of public health investigation. The legislature simply deferred to private interest groups that agreed to the bill. Naprapathy was not the subject of this legislation; and the resulting statute arbitrarily prohibited its practice by the only people qualified and trained to do so and authorized its practice by those neither trained nor

---

[8] "[T]he realities and defects of the legislative process, with its tendency to redistribute in favor of special interest groups, provide further grounds for increased judicial scrutiny to guarantee fundamental 'equality'. True 'rational' review of legislative enactments in the economic and social spheres is necessary to make the Constitution's guarantee of equal protection a reality for groups subject to governmental 'economic' discrimination." Comment, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 Harv.L.Rev. 1363, 1382-83 (1990) (footnotes omitted).

[9] *See, e.g., Washington v. Harper*, ___ U.S. ___, 110 S.Ct. 1028 (1990); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985); *Youngberg v. Romero*, 457 U.S. 307, 314-23 (1982)

inclined to do so. Accordingly, this case clearly involves a situtation in which a state statute infringes on the existing rights of health practitioners without bearing a rational relationship to the achievement of a legitimate state interest.[10]

We also acknowledge that the reasons hypothisized by the courts below, if accurate, would supply a reasonable basis for the law.[11] However, because the complaint and the legislative history suggest that the presumptions and conceptualizations of the lower courts were simply wrong, petitioners should be permitted to prove, as they would be in other circuits,[12] that the continuous beneficial practice of naprapathy since 1908, the lack of any complaint or public health investigation and the irrationality of limiting the practice of naprapathy to fully licensed physicians or chiropractic or osteopathic college graduates combine to invalidate the Act as applied to naprapaths under the rational basis test.

For a number of reasons, the complaint properly alleged that the application of the 1987 Medical Practice Act to naprapaths bore no reasonable relationship to the protection of public health and contradicted the speculative reasons advanced by the lower courts. First, in cases of this type, the court should be required to "determine *from the evidence* the legislative purpose or objective [of the regulation] and then determine if the

---

[10] For other examples of purported state health care legislation found to lack a rational basis, *see, e.g., American College of Obstetricians v. Thornburgh*, 737 F.2d 283, 295 (3d Cir. 1984), *aff'd.*, 476 U.S. 747 (1986); *Margaret S. v. Treen*, 597 F.Supp. 636, 675 (E.D.La. 1984), *aff'd*, 794 F.2d 994 (5th Cir. 1985); *Oliver v. Morton*, 361 F.Supp. 1262 (N.D. Ga. 1973).

[11] *See* 957 F.2d at 377 (App.5a) (". . . the General Assembly could have concluded that this level of education provides better training in theories of disease"); (" . . . it is within the legislative prerogative to limit the practice of medicine to those who provide the safest service"); (". . . the legislative could rationally conclude that a person afflicted with disease or other serious medical problems not treatable by naprapathy might be induced to postpone or even forego necessary medical treatment while undergoing treatment by a naprapath. It would even be rational for a legislature to conclude that the training offered in a school of naprapathy would in fact be inadequate for proper medical diagnosis and treatment . . . .").

[12] *See* cases cited in note 6 *supra*.

'regulation has no rational relation to that objective and therefore is beyond constitutional bound'."[13] Here, the legislative history of the Act discloses that no investigation of the public health aspects of the practice of naprapathy was conducted. The sponsor of the measure specifically stated his view that naprapaths were being recognized and licensed under other legislation. No intent to prevent certified naprapaths from practicing their profession, long recognized by state approval of its college charter, exists anywhere in the legislative record.

Second, the "[r]efusal to allow a man to qualify for [a] profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause." *Schware*, 353 U.S. at 249 (Frankfurter, J., concurring). Here, the Illinois General Assembly never articulated, suggested or intimated a need to protect the public from "incompetent naprapaths." The practice of naprapathy, as the complaint alleged, does not pose a threat to the safety and health of the public. In fact, since 1908, doctors of naprapathy, have successfully treated thousand of patients.

Third, the requirement that certified naprapaths take further education in medicine, osteopathy or chiropractic is an illusory and unreasonable requirement that bears no reasonable relation to the protection of public health. Supplemental educational requirements unrelated to the scope of the licensed profession are constitutionally impermissible. While the state clearly may set qualifications for the study and practice of medicine or the healing arts, when such qualifications "have no relation to such calling or profession . . . they can operate to deprive an individual of one of his rights to pursue a lawful vocation." *Dent v. West Virginia*, 129 U.S. 114, 121 (1898).

As the complaint alleges - and contrary to the lower courts' speculation - the requirement that a naprapath graduate from a medical, chiropractic or osteopathic school before practicing his or her profession is illusory. In addition, the requirement that naprapaths obtain training and education in a field of study unrelated to the practice of naprapathy is an example of

---

[13] *England*, 263 F.2d at 671 (emphasis in original), *quoting*, *Lee Optical*, 348 U.S. at 491.

"excessive" education designed to eliminate economic competition. Many courses taught by chiropractic and osteopathic schools are simply irrelevant to the practice of naprapathy. This educational requirement discourages the practice of naprapathy by irrationally demanding expertise in separate and unrelated schools of healing.

For these reasons, petitioners have overcome the presumptions mandating judicial deference to state public health legislation and should be given an opportunity to prove that the 1987 Medical Practice Act, as applied to naprapaths, has no basis that is rationally related to a legitimate government interest.

B. Equal Protection

Under the equal protection clause, "[t]he state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446. Although considerable deference is given to the decisions of legislators under the rational basis test, the test "is not a toothless one." *Matthews*, 427 U.S. at 510. In a long line of cases, this Court has applied rational basis scrutiny to strike down legislation where the permissible bounds of rationality were exceeded. *See, e.g., City of Cleburne*, 473 U.S. at 447 (zoning ordinance unconstitutional when based on irrational prejudice against mentally retarded); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (New Mexico statute that granted property tax exemption to only those Vietnam veterans who resided in state before a specified date); *Williams v. Vermont*, 472 U.S. 14 (1985) (Vermont sales tax credit statute applicable to current but not incoming residents); *Metropolitan Life Insurance v. Ward*, 470 U.S. 869 (1985) (Alabama statute taxing out-of-state insurance companies at a higher rate than domestic companies); *Zobel v. Williams*, 457 U.S. 55 (1982) (Alaska dividend program distributing state mineral income to adult residents based on the length of residency invalid because state has no legitimate interest in this distinction); *Plyler v. Doe*, 457 U.S. 202 (1982)(Texas statute withholding from local school districts funds for education of illegal alien children and authorizing districts to deny enrollment to such children); *Moreno*, 413 U.S. at 533 (federal provision denying food stamps to "unrelated" member of household).

Judicial analysis of a claimed equal protection violation begins with a recognized presumption of the validity of legislative classifications. *City of Cleburne*, 473 U.S. at 440. However, the presumption of validity can be overcome "by submitting evidence to show that the asserted grounds for the legislative classification lack reasonable support in fact. . . ." *New York State Club Ass'n.*, 487 U.S. at 17. The test for determining validity, like that for due process, is whether the classification is "rationally related to a legitimate governmental purpose." *City of Cleburne* 473 U.S. at 446.

In this case, the arbitrariness of the classification is underscored by the fact that the legislature itself did not examine any scientific, medical or social data. No investigation was undertaken with respect to public health concerns. No analysis of the respective treatment regimens of those who practice medicine without drugs or surgery was completed. In fact, no witnesses testified in committee in the house of origin for the legislation embodying the 1987 Medical Practice Act; and the bill's sponsor specifically believed that legislation independent of the Act was going forward to license naprapaths.

The absence of any evidence to discredit naprapathy as a legitimate healing art is underscored by the fact that the General Assembly did not reject the science of naprapathy; it simply limited the practice of it to those who graduate from medical, osteopathic, or chiropractic schools. This classification was arbitrary and capricious as applied to certified naprapaths. As the complaint alleged, doctors of medicine, osteopathy or chiropathy do not practice naprapathy. Naprapathy is more than a "method of treatment," it is a complete and separate school of healing that relies primarily on specific connective tissue manipulative therapy to relieve neurovascular interference, which may generate circulatory congestion and nerve irritation. Naprapathic treatment is unique and unlike the treatment given by medical doctors, osteopaths, or chiropractors.

In addition, medical, osteopathic and chiropractic schools simply do not teach naprapathy. As the complaint alleged, Chicago National College of Naprapathy (and its sister institute, Chicago National College of Naprapathy II) are the only institutions that are authorized to and do teach naprapathy in

Illinois. It is unreasonable to create a classification that permits a recognized scientific healing art to be practiced by those who are not trained in it and do not use it in their treatment retinue and prevents those trained and certified in it from doing so.

Finally, the classification is tainted by the fact that it was established through an interest group agreed bill designed to prevent competition in legitimate drugless healing arts. While the goal of legislation need only be rationally related to a legitimate governmental purpose, "some objectives - such as 'a bare desire to harm a politically unpopular group' - are not legitimate state interests.' " *City of Cleburne*, 473 U.S. at 446-47, *quoting, Moreno*, 413 U.S. at 534.

For anti-competitive reasons, entrenched components of the medical profession in Illinois historically have demonstrated hostility to alternative healing arts.[14] The state legislature traditionally has acted, as it should, as the gatekeeper for determining, based on scientific development and social acceptance, which disciplines are accorded legal recognition.

In this instance, however, the legislature deferred to the agreement of select practitioners to eradicate an existing healing arts practice. It did not do so on the basis of scientific investigation or study or out of public health concerns. Rather, it did so by inadvertence and deferral to competitive interest groups. The resulting classification, therefore, was the product of arbitrariness and has no conceivable relation to a legitimate governmental interest.

In light of the legislative history and practical impact of the 1987 Medical Practice Act, petitioners should have been permitted to prove that the classification between naprapaths and those eligible for a license to practice without drugs or surgery is arbitrary and capricious, unrelated to a legitimate governmental interest and without rational basis. Acceptance of the speculative rationale hypothesized by the lower courts to sustain

---

[14] *See, e.g., People v. Schaeffer*, 310 Ill. 574, 583 (1924) ("The very great prejudice existing among many physicians of the medical schools against the osteopaths, and of the osteopaths against those of the medical schools, is well known"); *People v. Love*, 298 Ill. 304, 312 (1921) ("The prejudice existing against chiropractors by medical men and osteopaths is known to be intense and in many cases unreasonable").

the law diminishes the efficacy of the rational basis test, insulates state legislation from constitutional scrutiny and converts the federal judiciary into a rubber stamp for state legislatures.

CONCLUSION

For these reasons, a writ of certiorari should be granted to review and ultimately reverse the decision below.

Respectfully submitted,

GARY L. STARKMAN
Counsel of Record
ROSS & HARDIES
150 N. Michigan Avenue; Suite 2500
Chicago, Illinois 60601
(312) 558-1000

MARJORIE E. MCCOLLOM
CANTWELL & CANTWELL
30 N. LaSalle Street; Suite 2424
Chicago, Illinois 60602
(312) 372-3000

Counsel for Petitioners

APPENDICES

APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

No. 90-3505

DR. PAUL MAGUIRE, D.N., DR. RODOLFO T. ABLERA, D.N. and DR. ANNE F. ADUKAITIS, D.N., et al.,

Plaintiffs-Appellants,

v.

ROBERT C. THOMPSON, Acting Director of the Department of Professional Regulation, State of Illinois (and Successor in Public Office to Stephen F. Selcke) and DEPARTMENT OF PROFESSIONAL REGULATION, State of Illinois,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 21-**Charles P. Kocoras**, *Judge.*

ARGUED SEPTEMBER 26, 1991—DECIDED FEBRUARY 26, 1992.

Before CUDAHY and RIPPLE, Circuit Judges, and ENGEL, *Senior Circuit Judge.*[*]

ENGEL, *Senior Circuit Judge.* Naprapathy is defined as "a therapeutic system of drugless treatment by manipulation depending on the theory that disease symptoms result from disorder in the ligaments and connective tissues." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971).

Paul Maguire and the other plaintiff doctors of naprapathy appeal from the district court's dismissal of their 42 U.S.C. §1983 claim that the Illinois Medical Practice Act of 1987 deprives them of their federal constitutional rights to due process and equal protection. The plaintiffs assert that the Illinois General Assembly lacked a rational basis to exclude doctors of napra-

[*] Honorable Albert J. Engel, Senior Circuit Judge for the United States Court of Appeals for Sixth Circuit, sitting by designation.

pathy from the licensing provisions of the Act, and seek an evidentiary hearing on the question. We affirm the district court's dismissal of their claims.

The Illinois Medical Practice Act of 1987 (the "MPA") establishes a licensing scheme for the practice of medicine and other healing arts in the State of Illinois. *See* ILL.REV.STAT. ch. 111, ¶¶4400-1-4400-63. To practice medicine, a person must possess a license. ILL.REV.STAT. ch. 111, ¶4400-3. The state will issue two types of licenses: a license to practice medicine, or a more limited license to treat human ailments without drugs or operative surgery. ILL.REV.STAT. ch. 111, ¶4400-11. The state requires a medical or osteopathic degree for the broader medical license, while the more restrictive license may be issued to those holding only a chiropractic degree. Id. The legislature penalizes those who practice medicine without one of these two licenses. ILL.REV.STAT. ch. 111, ¶¶4400-49- 4400-51, 4400-59.

All of the plaintiffs hold degrees in naprapathy. Naprapaths treat human ailments through manipulation of connective tissue. For example, one of the plaintiff naprapaths treated a woman for neck and shoulder pain by manipulating her neck and shoulders. While Illinois now requires a person to possess a limited license to treat human ailments without drugs in order to practice naprapathy, it will not issue a license to someone holding only a degree in naprapathy. Instead, it requires naprapaths to gain further education in one of the approved medical fields.

The predecessor law to the MPA, the Illinois Medical Practice Act of 1923 did not restrict the ability of naprapaths to practice their healing art. Nor, on its face, did it authorize the licensure of naprapaths. But in 1987, a group of naprapaths won the right to be licensed under the Illinois Medical Practice Act of 1923. *Potts v. Department of Registration and Educ.*, 496 N.E.2d 253 (Ill.Ct.App. 1987). Shortly thereafter, the General Assembly enacted the MPA, establishing educational requirements for medical licenses which exclude naprapaths.

Maguire and the rest of the plaintiffs filed suit under 42 U.S.C. § 1983, claiming that the Act violated their federal constitutional rights to due process and equal protection of the

laws.[1] The plaintiffs sued the Director of the Department of Professional Regulation (the "Director") in his official capacity. The Director filed a rule 12(b)(6) motion to dismiss for failure to state a claim. The district court granted the motion on *res judicata* grounds, finding the plaintiffs in an earlier state challenge to the legislation, *Potts v. Department of Registration and Education*, 538 N.E.2d 1140 (Ill.), *cert. denied*, 493 U.S. 992 (1989), to have been the virtual representatives of the plaintiffs in this case. Maguire then filed a Rule 59 motion to reconsider. The district court denied that motion, relying on the merits as well as *res judicata*, finding that the legislature had a rational basis for its licensing scheme.

We review rule 12(b)(6) motions to dismiss *de novo* to determine whether under any set of facts the non-moving party could prevail. *Villegas v. Princeton Farms, Inc.*, 893 F.2d 919, 924-25 (7th Cir. 1990). Maguire claims that the district court erred in dismissing the naprapaths' due process and equal protection challenges to the constitutionality of the Act's licensing provisions.

Unless a statute implicates a fundamental right or makes a suspect classification, to withstand fourteenth amendment scrutiny the law must bear only a rational relation to a legitimate state purpose. *See, e.g., Vance v. Bradley*, 440 U.S. 93, 97 (1979); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Maguire challenges the MPA's differentiation by education between doctors of naprapathy and doctors of medicine, osteopathy and chiropractic. Like similar licensing schemes, this statute does not create suspect classifications, nor does it implicate fundamental rights. *See Illinois Health Care Ass'n v. Illinois Dep't of Public Health*, 879 F.2d 286 (7th Cir. 1989); *Illinois Psychological Ass'n v. Falk*, 818 F.2d 1337 (7th Cir.1987); *Sutker v. Illinois Dental Soc'y*, 808 F.2d 632 (7th Cir. 1986). Thus, as Maguire concedes, the statute should be evaluated to determine whether it violates either the due process or the equal protection clauses of the fourteenth amendment using the rational basis test.

---

[1] The plaintiffs originally claimed violations of the state constitution as well, but have since waived them.

When applying the rational basis test, the courts presume the constitutionality of the classification. *Dukes*, 427 U.S. at 303. This presumption places the onus of proving unconstitutionality on the plaintiff, who "must prove that the facts on which the legislature may have relied in shaping the classification 'could not reasonably be conceived to be true by the governmental decisionmaker.' " *Sutker*, 808 F.2d at 635, *quoting Vance v. Bradley*, 440 U.S. 93, 111 (1979).

The MPA's licensing scheme seeks to protect the public from unqualified medical practitioners. While this purpose is legitimate, Maguire asserts that the educational classifications in the MPA do not rationally serve this purpose. The scheme allegedly violates due process by creating an arbitrary standard for the issuance of medical licenses. In support of their claim, plaintiffs claim that the legislature has never suggested a need to protect the public from naprapaths, nor did it conduct an investigation to determine whether naprapaths pose a danger to the public. Further, they urge that the additional statutory educational requirement to practice naprapathy is illusory because the classes taken to receive any of the degrees required to receive a license are largely irrelevant to naprapathy. Therefore, the MPA violates the due process clause.

Maguire also alleges a violation of the equal protection clause. This argument builds on the legislature's failure to conduct an investigation by citing the absence of a statistical or analytical justification in the legislative history for the educational distinctions. The legislature did not discredit naprapathy, but effectively prevented its practice by refusing to license those who possess only a degree in naprapathy. Also, the legislature abdicated its decisionmaking power by allowing other medical special interest groups to dictate the terms of the MPA, and thereby to exclude naprapaths because of an anticompetitive animus. Thus, the MPA sets out arbitrary and capricious standards, in violation of the fourteenth amendment right to equal protection.

We agree with the district court that the MPA violates neither the due process nor the equal protection provisions of the United States Constitution. As the district court noted, the details of the educational requirement indicate that the General Assembly

considered the amount of education necessary to guarantee adequately trained doctors. While Maguire characterizes the additional education received by other types of doctors as "irrelevant," the General Assembly could have concluded that this level of education provides better training in theories of disease. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). Logically, better training leads to better diagnosis and better treatment. While the naprapaths may have treated many people competently over the years, it is within the legislative prerogative to limit the practice of medicine to those who provide the safest service.

For example among the attachments to the plaintiffs' complaint is a flyer announcing a presentation by one of the plaintiffs, Dr. Verl Hunter on Tuesday, March 20, 1990 in Mt. Carmel. The flyer offers the opportunity to "learn about natural treatments for arthritis, diabetes, P.M.S. [pre-menstrual syndrome], T.M.J. [temporal mandibular joint], infertility, digestive disturbances, circulation problems, yeast infections, hyperactivity, prostate problems." The flyer further states that "Dr. Hunter specializes in herbology, homepathy [sic], acupuncture, manipulation of connective tissue." From representations such as this, from the possession of a doctor's degree and the title of "Doctor" employed by the plaintiffs, potential patients could, a legislature might rationally conclude, believe that the naprapath possessed skills far broader than those for which he or she was trained. While it might be unfair to believe that a naprapath would in fact engage in medical practice outside the field of naprapathy, the legislature could rationally conclude that a person afflicted with disease or other serious medical problems not treatable by naprapathy might be induced to postpone or even forego necessary medical treatment while undergoing treatment by a naprapath. It would even be rational for a legislature to conclude that the training offered in a school of naprapathy would in fact be inadequate for proper medical diagnosis and treatment and therefore people seeking treatment from those who hold only a degree in naprapathy run a serious risk of either misdiagnosis or nondiagnosis of their ailment. Under the law as we perceive it and demonstrate in this opinion, it is not necessary to hold an evidentiary hearing either before the legislature or before the trial court to determine whether in fact such circumstances have existed nor is it necessary to demonstrate that the legislature

in fact specifically articulated one or another such reasons as the basis for its action. It is enough under the cases to conclude as a matter of law that a legislature could have accepted such reasons and it is only necessary that the courts determine as a matter of law that they are rational in order to uphold the legislative action.

As the Supreme Court noted in *Lee Optical*, a health and safety reform "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Lee Optical*, 348 U.S. at 489. Finally, as we indicated in *Sutker*, "[i]t is the legislature's prerogative to determine which innovations in health care are acceptable risks and which are not." *Sutker*, 808 F.2d at 637. This determination does not require statistical studies, or even absolute logical consistency." It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Lee Optical*, 348 U.S. at 488.

Nor did the legislature act without knowledge of the field of naprapathy. Ten months prior to the passage of the MPA, *Potts v. Department of Registration and Education*, 496 N.E.2d 253 (Ill.Ct.App. 1987), allowed for the licensing of naprapaths under the old law. *See Potts v. Department of Registration and Educ.*, 538 N.E.2d 1140, (Ill.), *cert. denied*, 493 U.S. 992 (1989). Further, at the time of the MPA's consideration, the Senators knew of a bill pending in the Illinois House to license naprapaths. 85th GENERAL ASSEMBLY (May 14, 1987) (statement of Sen. Jones). This indicates that the legislature intended the effect of the law eventually passed.

Also, the silence of the MPA's legislative history does not provide sufficient basis for an evidentiary hearing to establish the lack of a rational purpose. The naprapaths seek this hearing to prove the benefits of their healing art. They again base their argument on the failure of the General Assembly to conduct investigations, hearings or any other discussion of the science of naprapathy. These failures indicate that the General Assembly could not have actually considered any of the rationales asserted by the court or the Director to justify the scheme in the MPA.

Under these circumstances, Maguire asserts that the courts should not be allowed to hypothesize a rational basis for legislation. Instead, the court should conduct an evidentiary hearing where the naprapaths could prove that their actions pose no threat to the health and safety of the public.

While requiring the legislature to consider fully all of the implications of a law, to articulate the reasoning behind the enactment of a statute, and to remain free from the "taint" of special interest groups might arguably improve both the legislative process and the laws themselves, the failure to take these steps does not result in a violation of the Constitution. The fourteenth amendment requires a rational relationship to a legitimate state purpose, but it does not require that the legislature spell out its reasoning. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("this Court has never insisted that a legislative body articulate its reasons for enacting a statute"). Mere participation by the public, including participation by both the American Medical Association and the American Naprapathic Association, is an integral part of the representative system. Lobbying activities, properly conducted, are not a constitutional defect. With this in mind, the answer to the naprapaths' complaint is to be found not in an evidentiary hearing, but in the century-old advice of the Supreme Court: "for protection against abuses by legislatures the people must resort to the polls, not to the courts." *Munn v. Illinois*, 94 U.S. 113, 134 (1876). We find here no invidious discrimination of the sort that the Fourteenth Amendment prohibits.

Because we hold that the MPA does not violate either the equal protection or the due process clauses of the United States Constitution, we reach no conclusion as to whether the plaintiffs in *Potts v. Department of Registration and Education*, 538 N.E.2d 1140, (Ill.), cert. denied, 493 U.S. 992 (1989), were the virtual representatives of the plaintiffs in this case.

For the foregoing reasons, we AFFIRM the Rule 12(b)(6) dismissal of Maguire's claims by the district court.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DR. PAUL MAGUIRE, D.N., et al.,
Plaintiffs,
v.
ROBERT C. THOMPSON, Acting Director for the Department of Professional Regulation, et al.,
Defendants.
90 C 21

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on a motion to vacate the Judgment of May 4, 1990 dismissing the plaintiffs' civil rights action. *Maguire v. Selcke*, No. 90 C 21, Memorandum Opinion (N.D.Ill. May 4, 1990). For the reasons set forth below, the plaintiffs' motion is denied.

PROCEDURAL HISTORY

The plaintiffs in this action, all doctors of naprapathy, wish to challenge the Illinois Medical Practice Act ("MPA"), which restricts the practice of naprapathy to medical doctors, osteopaths, and chiropractors. Suit was brought in federal court under 42 U.S.C. 1983 alleging due process and equal protection violation of both the United States and Illinois Constitutions.

The defendants, the Department of Professional Regulation and its Director, moved for dismissal under Rule 12(b)(6). The defendants asserted two arguments. First, they argued that there is strong case law requiring the court to find, as a matter of law, that the restriction on the authorized practice of naprapathy is rationally related to a legitimate governmental purpose. Second, the defendants argued that the plaintiffs' claims were conclusively determined in *Potts v. Illinois Department of Registration and Education*, 128 Ill.2d 322, 538 N.E.2d 1140 (1989) and are therefore barred from relitigation by the res judicata

doctrine. The plaintiffs' response in opposition to dismissal was not filed until after this Court granted the defendants' motion to dismiss.

The Memorandum Opinion dismissing the case focused primarily on the defendants' res judicata argument. We found that the necessary elements for res judicata were present: final judgment on the merits, identity of cause of action, and identity of parties or their privities. *Maguire*, No. 90 C 21, Memorandum Opinion at 15. The core of the plaintiffs' challenge to this finding is an assertion that, because the plaintiffs in *Potts* did not sufficiently represent the interests of the plaintiffs in this action, they could not be considered virtual representatives for purposes of establishing an identity of parties.

BACKGROUND

By this action the plaintiffs are attempting to challenge the extent to which Illinois law has restricted the authorized practice of naprapathy to medical doctors, osteopaths, and chiropractors. The plaintiffs allege that they are certified doctors of naprapathy who "have practiced naprapathy for many years." *First Amended Complaint for Declaratory and Injunctive Relief and Attorney's Fees*. They claim that the 1987 amendment of the Illinois Medical Practice Act ("MPA") which denies them a license to practice naprapathy and that the statute violates their equal protection and due process both the United States and Illinois Constitutions. The plaintiffs seek declaratory and injunctive relief.

The MPA sets forth the requirements for those seeking both full-and limited-practice licenses to engage in the practice of healing in Illinois. Just prior to 1987, the Illinois appellate court held that graduates of naprapathic colleges were eligible for a limited license under the Act. In a 1987 amendment, however, the legislature modified the Act so that individuals holding only naprapathic degrees cannot be licensed.

Section 11(A) allows the licensee to practice medicine in all its branches provided that he or she is a graduate of a medical or osteopathic college. Ill.Rev.Stat. ch. 111, ¶4400 et seq. §11 (1990). An applicant may also obtain a limited license under Section

11(B) provided that the licensee has a degree from a chiropractic school. The limited license authorizes the licensee "to treat human ailments without drugs and without operative surgery." Section 11(B) sets out the educational requirements that an applicant must meet before being allowed to sit for the exam for licensure: at least two years of study in a liberal arts college or its equivalent, followed by instruction in the treatment of human ailments at a chiropractic college of good standing.

The 1987 MPA was subsequently challenged at the state level. In *Potts v. Illinois Department of Registration and Education*, 128 Ill.2d 322, 538 N.E.2d 1140 (1989), two naprapaths claimed that the MPA deprived them of their property without due process of law and that, because the act discriminates against naprapaths without a reasonable basis for doing so, it violates the equal protection provisions of both the Illinois and the Federal Constitution. Finding that all four constitutional challenges lacked merit, the Illinois Supreme Court upheld the constitutionality of the 1987 MPA Potts, 538 N.E.2d at 1146.

The plaintiffs in this action opted not to join in the Potts litigation. While the *Potts* case incorporated an additional issue not raised here, and the naprapaths acting as plaintiffs in *Potts* are not parties to this case, in all other respects the actions are identical. The complaint seed protection of the same interests from the same infringement by the same legislative act at issue in *Potts*. Moreover, the identical claim for relief is based on the same legal theories asserted in the earlier case. Consequently, the defendants moved for dismissal on the grounds that (1) this action is barred by res judicata and (2) even if not so barred, the law so strongly indicates that the statute is rationally related to a legitimate governmental purpose, that the plaintiffs are unable to state a claim upon which relief can be granted.

An amended complaint adding additional plaintiffs had been filed the day before the judgment to dismiss was rendered. Assuming the circumstances underlying this case to be as the plaintiffs alleged them to be, this court granted the defendants' motion to dismiss on res judicata grounds.

Ten days after the defendants' motion was granted, the plaintiffs filed this motion asking the court to vacate its order

dismissing the suit on the grounds that the *Potts* plaintiffs were not, as a legal or factual matter, the virtual representatives of the interests asserted in this litigation. The plaintiffs also submitted affidavits stating that the plaintiffs added by the amended complaint were not yet graduates of naprapathy when Potts was decided, were unable to participate in the case, and were not consulted about that litigation.

DISCUSSION

1. Procedure

This motion to reconsider is brought under Federal Rules of Civil Procedure, Rule 59(b), Motion to alter or amend judgment. The purpose of such a motion is to correct manifest errors of law or fact and to present newly discovered evidence; it is not intended as a vehicle for presenting legal theories or evidence for the first time. *Keene Corp. v. International Fidelity Ins. Co.*, 561 F.Supp. 656, 665-66 (N.D.Ill. 1982).

The plaintiffs' suit was dismissed on the defendants' Rule 12(b)(6) motion. A 12(b)(6) motion asserts that, assuming the facts to be as the nonmovant avers them to be, the nonmovant has failed to state a claim upon which relief can be granted. Such a motion is granted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v Gibson*, 355 U.S. 41,46, 78 S.Ct. 99, 102 L.Ed.2d 80 (1957).

In granting the defendants' 12(b)(6) motion, we considered whether there was sufficient identity both in facts and in issues between *Potts* and the present case to hold that the matter was barred from relitigation. Finding that there was such identity, the court dismissed the action.

The plaintiffs' motion argues that the Court's dismissal of their suit constitutes a manifest error of law requiring that the decision be vacated. Specifically, the plaintiffs challenge the finding of sufficient privity to justify holding the *Potts* decision binding on the present plaintiffs. The argument is phrased in two parts: (1) that the issue of whether the plaintiffs in were virtual representatives of the present plaintiffs is a factual question which the court improperly determined on a motion

to dismiss and (2) that the *Potts* plaintiffs did not adequately represent the interests of the current plaintiffs as shown by their failure to ask for an evidentiary hearing to which the current plaintiffs feel they are entitled.

2. Res judicata revisited

The doctrine of res judicata is based on the notion that a right, question or fact put in issue and determined by a court of competent jurisdiction cannot be disputed in a later suit between the same parties or their privities. *Diaz v. City of Chicago*, 601 F.Supp. 1251, 1252 (N.D.Ill. 1984). The aim of the doctrine is to save the parties the cost and vexation of multiple lawsuits, conserve judicial resources and, by preventing inconsistent decisions, encourage reliance on adjudication. *Diaz*, 601 F.Supp. at 1252, citing *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 415 (1980); *Montana v. United States*, 440 U.S. 147, 153-4, 99 S.Ct. 970, 973-74, 59 L.Ed.2d 210 (1979).

Three elements must be present before a case may be barred on the grounds of res judicata: (1) final judgment on the merits in an earlier action; (2) an identity of the cause of action in both earlier and later suits; and (3) an identity of parties or their privities in the two suits. *NAACP v. Hunt,* 891 F.2d 1555, 1560 (11th Cir. 1990); *Diaz v. City of Chicago*, 601 F.Supp. 1251 (N.D.Ill. 1984); *Maguire v. Selcke*, Memorandum Op. at 7-8, citing *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). Where all elements exist, the prior case bars the parties or their privies from relitigating all issues raised in the prior action. *NAACP*, 891 F.2d at 1560; *Maguire* at 8, citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

The plaintiffs do not dispute the finding that the first two requirements are met in this case. What the plaintiffs contest is our determination that the third requirement, identity of parties, is satisfied.

The policy underlying the identity of parties, or privity, requirement is to guaranty that the litigants had a fair opportunity to be heard, while preventing the relitigation of the same cause of action. " Privity is defined as a relationship between one who is a party of record and a nonparty that is sufficiently

close so that a judgment against the party should bind the nonparty." *NAACP*, 891 F.2d at 1560 (Action brought by NAACP members seeking to enjoin flying of the confederate flag barred by res judicata due to earlier action brought by state legislator).[1] The relationship has been found to be sufficiently close for res judicata purposes where the nonparties interests are adequately represented by the party in the original suit or where the party to the original suit is "so closely aligned to the nonparty's interest as to be his virtual representative." *NAACP*, 891 F.2d at 1560-1; *see also Johnson v. Nationwide Business Forms, Inc.*, 103 Ill.App.3d 631, 431 N.E.2d 1096 (1981); *Hartke v. Chicago Board of Election Commissioners*, 651 F.Supp. 86, 90 (N.D.Ill. 1986). This Court has noted that the guidelines for analyzing the issue of " virtual representation" have not been established. *Maguire*, No. 90 C 21, Memorandum Op. at 10.

Plaintiffs assert that the question is factual and cannot be determined without an evidentiary hearing. This assertion is clearly incorrect in this case. First, on a motion to dismiss, the facts are assumed to be as the plaintiff has asserted them in the pleadings, leaving the matter to be determined solely on the basis of law. *Illinois Health Care Association v. Illinois Department of Public Health*, 879 F.2d 286, 288 (7th Cir. 1989).[2] Therefore, in ruling on the motion to dismiss in this case, the court examined the facts and circumstances as plaintiffs have alleged them to be to determine whether they warranted the application of res judicata. Second, while the question of the sufficiency of the relationship is answered on a case by case basis, it is a question of law, not fact, which can be answered upon a motion to dismiss. *NAACP*, 891 F.2d at 1561; *see, e.g., Diaz v. City of Chicago*, 601 F.Supp. 1251, 1254 (N.D.Ill. 1984) (granting the motion to dismiss after making the legal determination that the plaintiffs were virtually represented in an

---

[1] Alabama law requires "substantial identity of parties" before a suit can be barred on res judicata grounds

[2] The plaintiffs object to the relevancy of *Illinois Health Care Association* on factual distinctions. While it is true that case dealt with the licensing of nursing homes as opposed to professionals, the case is useful as an example of the reasoning courts may use in analyzing due process and equal protection challenges to state infringement of non-fundamental rights and interests.

earlier litigation). Thus, this court did not err in entertaining the defendant's motion to dismiss without an evidentiary hearing.

In this case there are several undisputed facts that support a finding that the plaintiffs in Potts were virtual representatives of the plaintiffs in this case. First, contrary to the plaintiffs' contention, the *Potts* plaintiffs and the present plaintiffs are all graduates of naprapathy who wish to practice naprapathy. *Potts*, 538 N.E.2d 1141. As such the *Potts* plaintiffs were barred from their chosen occupation by the same provisions of the MPA standing in the way of the current plaintiffs. In addition, the *Potts* plaintiffs raised the same state and federal challenges to the Illinois statute as it pertains to graduates in naprapathy, and sought the same declaratory relief asserted in the present action. Given their identical professional positions and legal claims, it is clear that both sets of plaintiffs have the same legal interests which each has tried to vindicate in their separate court actions. Moreover, this shared interest and the plaintiffs' practice in the same, narrow practice of healing allowed for an awareness of and opportunity to participate in the *Potts* litigation. For these reasons, this court found in the first instance, and holds now on reconsideration, that these circumstances supply sufficient basis for finding that the *Potts* plaintiffs are virtual representatives of the present plaintiffs.

The plaintiffs point to four facts intended to show that this court's finding of representation lacks sufficient factual basis: (1) that the present plaintiffs prefer the federal to the state forum; (2) that the present plaintiffs did not understand that the outcome of *Potts* could affect their ability to file in federal court; (3) that the present plaintiffs did not understand that the *Potts* plaintiffs represented their interests, and 4) that the *Potts* did not seek an evidentiary hearing.

The first point is irrelevant to our inquiry. The policy underlying the restricted use of res judicata is intended to guaranty the opportunity to be heard, *see Diaz*, 601 F.Supp. at 1254, not the opportunity to be heard in one's preferred forum. Moreover, "[i]n this era of overcrowded dockets, the courts have a positive duty to restrict needless relitigation of issues." *Id.* To give weight to a plaintiff's choice of forum when that plaintiff was aware of pending litigation involving the same interests

would encourage the duplication of judicial effort that the res judicata doctrine seeks to avoid. Splinter groups of potential plaintiffs would be able to abstain from participating in one action in order to preserve the possibility of proceeding in the alternate forum should the first suit fail.

The second and third points, assumed to be true for purposes of the Rule 12(b)(6) motion, do not help the plaintiffs, particularly in light of Paul Maguire's affidavit asserting that the affiant and the other plaintiffs in this case were aware of the *Potts* litigation but chose not to join. " Various courts have either held or suggested that the opportunity to intervene may be enough to bind a person not a party." *Diaz*, 601 F.Supp. at 1254, citing *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 114, 88 S.Ct. 733, 740 (1968); *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486, 88 S.Ct. 602 (1968); *Cummins Diesel Michigan. Inc. v. The Falcon,* 305 F.2d 721 (7th Cir. 1962); *Treasure Salvors Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F.Supp. 507, 516. An analogy may be drawn to *Hartke*. In that case the plaintiffs in the second suit argued against a holding of res judicata on the grounds, among others, that they had no contact with the plaintiff of the prior suit and had no input into the litigation. The court stated that these two facts would not "impugn the integrity of the representation of interests" by the plaintiffs in the first suit. The court held that "subsequent plaintiffs may be barred by res judicata whether acting in concert with or separate from prior litigants. *Hartke*, 651 F.Supp. at 90.

Thus in the present case, the plaintiffs' lack of understanding of legal principles does not affect the kind of representation their interests received in *Potts*. What is relevant is the current plaintiffs were aware that identically situated persons with identical interests were pursuing litigation of the issues and rights

alleged in this case.[3]

Finally, the failure of the *Potts* plaintiffs to ask for an evidentiary hearing would not prevent dismissal based on res judicata in this case. Courts have frequently noted that "privity does not require for purposes of adequate representation that the prior plaintiff raise and formulate all conceivable arguments on behalf of a cause of action in the best possible fashion. *Hartke*, 651 F.Supp at 90.

Hartke again provides an example. In that case, the plaintiffs complained that the constitutional issues were not given the prominence and specificity in the earlier lawsuit that the *Hartke* plaintiffs would have given them. The plaintiffs argued that these facts indicated the inadequacy of the representation provided by the plaintiffs in the earlier action. The *Hartke* court found this argument to be both incorrect and irrelevant. It is sufficient, stated the court, that the legal theories actually adduced in support of the prior prayer for relief competently advocate that same interest. *Id.*

As for this case, even if requesting an evidentiary hearing would be the wisest course in asserting the naprapaths' claims, the failure of the *Potts* litigants to make such a request does not require a finding of inadequate representation. The plaintiffs here do not point to any facts indicating that *Potts* was prosecuted less than vigorously. Nor can they dispute that the legal theories used by the *Potts* plaintiffs did not competently advocate their interests since those theories are exactly the theories presented in this case. Because the present plaintiffs share the same interests, allege the same cause of action and present the same issues litigated in *Potts*, there is no basis for finding that this

---

[3] Based on their amended complaint, the plaintiffs suggest that the addition of plaintiffs who were unable to participate in the *Potts* litigation eliminates the possibility of finding sufficient privity between the *Potts* and current plaintiffs. They give no reason for their inability to participate and do not claim that they were unaware of the pending litigation. At the same time, these new plaintiffs have joined this action because they share the same interests that the *Potts* plaintiffs sought to protect. The Illinois Supreme Court found that those interests did not outweigh the state's interest in regulating the practice of healing. Thus, even if those plaintiffs were not barred by the doctrine of res judicata, given the law relied on by the *Potts* court and detailed below, they are not able to state a claim upon which relief can be granted.

court's dismissal of the action on res judicata grounds is a manifest error of law such that the judgment must be vacated.

2. Rational basis as grounds for dismissal

The plaintiffs have also questioned the adequacy of representation provided by the *Potts* plaintiffs "as a matter of law." The plaintiffs argue that the failure to request an evidentiary hearing demonstrates that *Potts* plaintiffs were inadequate representatives of the current plaintiffs' interests. This argument is based on the incorrect assertion that the federal Constitution mandates an evidentiary hearing as a matter of course. Because a fundamental right is not at issue in this case, the rational basis test supplies the standard for analyzing the plaintiffs' equal protection and due process claims. *Brandwein v. California Board of Osteopathic Examiners*, 708 F.2d 1466, 1470 (9th Cir. 1983); *Meier v. Anderson*, 692 F.Supp. 546 (E.D.PA 1988), aff'd 869 F.2d 590; *see also Stutker*, 808 F.2d 632, 634 (7th Cir. 1986); *Potts*, 538 N.E.2d at 1143, quoting *People v. Love*, 298 Ill. 304, 310, 131 N.E. 809 (1921). The test is highly deferential to the legislature, and the United States Supreme Court "has been especially deferential to legislative classifications in cases of challenges to the state regulation of licensed professions." *Brandwein*, 708 F.2d at 1470, citing *Watson v. Maryland*, 218 U.S. 173, 30 S.Ct. 644, 54 L.Ed 987 (1910); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 462, 99 L.Ed. 563 (1955). Such deference is justified by the presumption embodied in the Constitution that, "absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley* 440 U.S. 93, 97, 99 S.Ct. 939, 942-3, 59 L.Ed.2d 171 (1979). An act passes the rational basis test if a court "can hypothesize plausible reasons for legislation that are within the legitimate goals of a governmental classification and it does not matter whether the reasons advanced actually motivated the legislative action." *Illinois Health Care Association v. Department of Public Health*, 879 F.2d 286, 288 (7th Cir. 1989) quoted in *Lawline v. American Bar Association*, No. 88 C 7203, Memorandum Opinion and Order, at 15-16 (N.D.Ill. May 24, 1990). Because the hypothesized facts need not be shown to have been actually considered

by the legislature, an evidentiary hearing is not a constitutional prerequisite to this court's application of the rational basis test.

In this case there is no issue of material fact preventing this court from deciding whether the MPA's restriction on the practice of naprapathy is rationally related to a legitimate governmental purpose. Plaintiffs cited *Sutker v. Illinois State Dental Society*, 808 F.2d 632 (7th Cir. 1987) as support for this claim. While the court in that case did "mandate" an evidentiary hearing to determine whether the provisions of the challenged statute had a rational basis, it does not follow that such a hearing is necessary in every case, and defendants have cited several cases in which no hearing was held before the court decided to dismiss the suit. *See, e.g., Lawline v. American Bar Association*, No. 88 C 7203, Memorandum Opinion and Order (N.D.Ill. May 24, 1990); *Thomas v. Board of Examiners*, 866 F.2d 225 (7th Cir. 1988); *Diaz*, 601 F.Supp. 1251; *Vaden v. Village of Maywood, Illinois*, 809 F.2d 361 (7th Cir. 1987); *Illinois Health Care Association v. Department of Public Health*, 879 F.2d 286 (7th Cir. 1989). Thus our decision to consider the defendants' motion to dismiss without an evidentiary hearing does not constitute a manifest error of law.

The parties do not question the state's legitimate interest in regulating medical professionals for the protection of the public health. Nor do the parties question the power of the legislature to set reasonable licensing requriements for the practice of various branches of medicine. *Potts*, 538 N.E.2d at 1143. The plaintiffs' claim is that the restrictions established by the MPA are too broad in their exclusion of graduates in naprapathy from the practice of that area of healing.

"The federal court long ago . . . got out of the business of second guessing state decisions on occupational licensure." *Illinois Psychologicial Association v. Falk*, 818 F.2d 1337 (7th Cir. 1987). "In the area of social and economic regulation, 'it is only invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.' " *Illinois Health Care*, 819 F.2d at 289, citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303-4, 96 S.Ct. 2513, 2516-17, 49 L.Ed.2d 511 (1976); *Vaden*, 809 F.2d at 365. A court need only determine whether there are "plausible," "arguable" or "conceivable"

reasons justifying the legislative restrictions. *See Brandwein,* 708 F.2d at 1473. The legislature is presumed to have investigated the question and "[i]t is for the legislature, not the courts to balance the advantages and disadvantages of the requirements. *Potts*, 538 N.E.2d at. 1145, citing *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487, 75 S.Ct. 461, 464, 99 L.Ed. 563, 571 (1955). If the court can hypothesize a legitimate purpose which would justify distinctions made in the state's regulatory scheme, the case is properly dismissed. *Brandwein v. California Board of Osteopathic Examiners*, 708 F.2d 1466 (1983). The burden is therefore on the party challenging the statute to show that no conceivable legitimate public interest is furthered by the classification. *Illinois Health Care*, 879 F.2d at 289, citing *Oriental Health Spa v. City of Fort Wayne*, 864 F.2d 486, 490.

The statute makes distinctions among qualifed applicants according to the type and degree of training and education they have had. Graduates of medical schools are eligible for licensure in any area of the healing arts, §11(A), while chiropractors meeting express educational requirements are able to practice in those areas of treatment which do not employ drugs or surgery, §11(B). Ill.Ann.Stat. ch 111, ¶4400 et seq. §11 (Smith-Hurd Supp. 1990). Graduates of naprapathic colleges are excluded from licensure by omission.

The fact that the Act details the educational requirements needed to qualify for licensure indicates that the legislature considered what form of education should be required to guaranty that those engaged in diagnosing and treating human ailments were adequately trained. Further, because the new MPA was passed after the Illinois Supreme Court had ordered the Department to examine and license naprapaths, we can assume that the General Assembly recognized the affect the new Act would have, and deliberately chose that effect. *Potts*, 538 N.E.2d at 1145.

The defendants suggest a plausible reasoned basis for the exclusion of naprapaths. "Medicine, osteopathy chiropractic have well-established schools, accrediting bodies, courses of study, and training regimes." *Defendants' Memorandum in Support of Motion to Dismiss* at 7. As the court recognized in *Brandwein*, differences in curriculum and training impact not only on the degree of substantive knowledge of the practitioner, but also on

his or her judgment as to the necessity and form of treatment. *Brandwein*, 708 F.2d at 1473. It is conceivable that the legislature concluded that the philosophy or course of study of the naprapathic colleges does not sufficiently prepare their graduates to diagnose and treat human ailments. While it is possible that this decision will exclude competent practitioners from the practice of naprapathy, such overbreadth does not require a finding that the provison is irrational. The rational basis test does not require that the legislation be perfectly tailored to serve its legitimate end, and the federal courts long ago removed themselves from the business of second-guessing the legislature. *Illinois Psychological Association*, 818 F.2d at 1341. Thus the plaintiffs' claims that they are adequately trained and have successfully treated patients by naprapathic methods are most properly voiced to the state legislature, not to the courts. *Williamson*, 348 U.S. at 488, 75 S.Ct. at 464-65.

The plaintiffs have failed to assert any facts that would defeat our finding that there is a rational realtionship between the state's licensing restrictions and the legitimate purpose the restrictions are intended to serve. As a result, we find that even if the plaintiffs' federal claims are not barred by the doctrine of res judicata, they must be dismissed for failure to allege a claim upon which relief can be granted.

3. State claims

The analysis of the plaintiffs' arguments under the Illinois Constitution's due process and equal protection clauses is the same as that for the claims made under the federal Constitution. *Sutker*, 808 F.2d at 632, n. 1. Therefore the above reasoning is applicable to the plaintiffs' state law claims. Moreover, the Illinois Supreme Court has decided the state issues raised in this suit in *Potts*. A state supreme court judgment with respect to state law is binding in the federal courts. *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262 (7th Cir. 1983).

In *Potts* the Illinois Supreme Court held that the MPA's regulatory scheme as it applied to naprapaths did not violate the state Constitution. 538 N.E.2d at 1144-45. There is nothing in the facts of *Potts* to distinguish it from the present case, nor has there been a significant change in circumstances. Thus,

regardless of whether the res judicata doctrine is applied, *Potts* is determinative of the state law issues in this case and dictates that the state causes of action be dismissed for failure to state a claim upon which relief can be granted.

CONCLUSION

For the reasons set forth above, the plaintiffs' motion to vacate this Court's judgment dismissing their claim is denied.

Charles P. Kocoras
United States District Judge

Dated: NOV 1 1990

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: February 26, 1992

BEFORE: Honorable Richard D. Cudahy, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable Albert J. Engel, Senior Circuit Judge*

No. 90-3505

DR. PAUL MAGUIRE, D.N., DR. RODOLFO T. ABIERA, D.N. and DR. ANNE F. ADUKAITIS, D.N., et al.,
Plaintiffs - Appellants

v.

ROBERT C. THOMPSON, Acting Director of the Department of Professional Regulation, State of Illinois (and Successor in Public Office to Stephen F. Selcke) and DEPARTMENT OF PROFESSIONAL REGULATION, State of Illinois,
Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division No. 90 C 21,
Judge **Charles P. Kocoras**

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the decision of this Court entered this date.

---

* Honorable Albert J. Engel, Senior Circuit Judge for the United States Court of Appeals for the Sixth Circuit, sitting by designation.

APPENDIX D

RELEVANT STATUTE

Ill. Rev. Stat. ch. 111, S4400-11

4400-11. Professional education-Minimum standards §11. The minimum standards of professional education to be enforced by the Department in conducting examinations and issuing licenses shall be as follows;

(A) Practice of medicine. For the practice of medicine in all of its branches:

(1) For applications for licensure under subsection (D) of Section 19 of this Act*

(a) that the applicant is a graduate of a medical or osteopathic college in the United States, its territories or Canada, that the applicant has completed, as a prerequisite to admission thereto, a 2 years' course of instruction in a college of liberal arts, or its equivalent, and a course of instruction in a medical or osteopathic college approved by the Department or by a private, not for profit accrediting body approved by the Department, and in addition thereto, a course of postgraduate clinical training of not less than 12 months as approved by the Department; or

(b) that the applicant is a graduate of a medical or osteopathic college located outside the United States, its territories or Canada, and that the degree conferred is officially recognized by the country for the purposes of licensure, that the applicant has completed as a prerequisite thereto a 2 years' course of instruction in a college of liberal arts or its equivalent, and a course of instruction in a medical or osteopathic college approved by the Department, which course shall have been not less than 132 weeks in duration and shall have been completed within a period of not less than 35 months, and, in addition thereto, a course of postgraduate clinical training of not less than 12 months, as approved by the Department.

For the purposes of this subparagraph (b) an applicant is

---

* 1 Paragraph 4400-19 of this chapter.

considered to be a graduate of a medical college if the degree which is conferred is officially recognized by that country for the purposes of receiving a license to practice medicine in all of its branches or a document is granted by the medical college which certifies the completion of all formal training requirements including any internship and social service; or

(c) that the applicant has studied medicine at a medical or osteopathic college located outside the United States, its territories, or Canada, that the applicant has completed as a prerequisite thereto a 2 year course of instruction in a college of liberal arts or its equivalent and all of the formal requirements of a foreign medical school except internship and social service, which course shall have been not less than 132 weeks in duration and shall have been completed within a period of not less than 35 months; that the applicant has submitted an application to a medical college accredited by the Liaison Committee on Medical Education and submitted to such evaluation procedures, including use of nationally recognized medical student tests or tests devised by the individual medical college, and that the applicant has satisfactorily completed one academic year of supervised clinical training under the direction of such medical college; and, in addition thereto has completed a course of postgraduate clinical training of not less than 12 months as approved by the Department.

(d) Any clinical clerkships must have been completed in compliance with Section 10.3 of the "Hospital Licensing Act" , approved July 1, 1953, as amended.[2]

(2) Effective January 1,1988, for applications for licensure made subsequent to January 1, 1988, under Sections 9 or 17 of this Act[3] by individuals not described in paragraph (3) of subsection (A) of Section 11 who graduated after December 31, 1984:

(a) that the applicant: (i) graduated from a medical or osteopathic college officially recognized by the jurisdiction in which it is located for the purpose of receiving a license to practice

---

[2] Chapter 111½, ¶142 et seq.

[3] Paragraphs 4400-9 or 4400-17 of this chapter.

medicine in all of its branches, and the applicant has completed, as defined by the Department, a 6 year post-secondary course of study comprising at least 2 academic years of study in the basic medical sciences; and 2 academic years of study in the clinical sciences, while enrolled in the medical college which conferred the degree, the core rotations of which must have been completed in clinical teaching facilities owned, operated or formally affiliated with the medical college which conferred the degree, or under contract in teaching facilities owned, operated or affiliated with another medical college which is officially recognized by the jurisdiction in which the medical school which conferred the degree is located; or (ii) graduated from a medical or osteopathic college accredited by the Liaison Committee on Medical Education, the Committee on Accreditation of Canadian Medical Schools in conjunction with the Liaison Committee on Medical Education, or the American Osteopathic Bureau on Professional Education; and, (iii) in addition thereto, has completed a course of postgraduate clinical training of not less than 24 months, as approved by the Department; or

(b) that the applicant has studied medicine at a medical or osteopathic college located outside the United States, its territories, or Canada, that the applicant, in addition to satisfying the requirements of subparagraph (a), except for the awarding of a degree, has completed all of the formal requirements of a foreign medical school except internship and social service and has submitted an application to a medical college accredited by the Liaison Committee on Medical Education and submitted to such evaluation procedures, including use of nationally recognized medical student tests or tests devised by the individual medical college, and that the applicant has satisfactorily completed one academic year of supervised clinical training under the direction of such medical college; and, in addition thereto, has completed a course of postgraduate clinical training of not less than 24 months as approved by the Department.

(3) For applications for licensure made subsequent to December 31, 1989, by individuals who graduated more than 5 years prior to the date of application; and for applications for licensure made subsequent to July 1, 1987, and prior to January

1, 1990, under Sections 9 or 17 of this Act, by individuals who graduated prior to January 1, 1985:

(a) that the applicant: (i) graduated from a medical or osteopathic college officially recognized by the jurisdiction in which it is located for the purpose of receiving a license to practice medicine in all of its branches, and the applicant has completed, as defined by the Department, a 6 year post-secondary course of study comprised of at least 2 academic years of study in the basic medical sciences and 2 academic years of study in the clinical sciences, while enrolled in the medical college which conferred the degree, the core rotations of which must have been completed in clinical teaching facilities owned, operated or formally affiliated with the medical college which conferred the degree, or under contract in teaching facilities owned, operated or affiliated with another medical college which is officially recognized by the jurisdiction in which the medical school which conferred the degree is located; or (ii) graduated from a medical or osteopathic college accredited by the Liaison Committee on Medical Education or the American Osteopathic Bureau on Professional Education; and (iii) in addition thereto, has completed a course of postgraduate clinical training of not less than 24 months, as approved by the Department; or

(b) that the applicant (i) has studied medicine at a medical or osteopathic college located outside the United States, its territories, or Canada; (ii) in addition to satisfying the requirement of subparagraph (a), except for the awarding of a degree, has completed all of the formal requirements of a foreign medical school except internship and social service and has submitted an application to a medical college accredited by the Liaison Committee on Medical Education and submitted to such evaluation procedures, including use of nationally recognized medical student tests or tests devised by the individual medical college; (iii) has satisfactorily completed one academic year of supervised clinical training under the direction of such medical college; and (iv) has completed a course of postgraduate clinical training of not less than 24 months as approved by the Department; and

(c) that the applicant has submitted such other information to the Department as the Medical Licensing Board

may require for a determination that the applicant has maintained such clinical skills as are necessary for the practice of medicine in all of its branches. The Medical Licensing Board, in its discretion, may grant such license upon a written determination that the applicant is capable of satisfactorily practicing medicine in all of its branches. The Medical Licensing Board may require the applicant to appear in person before the Board. The Medical Licensing Board shall review the professional activities of the applicant between the date of graduation and the date of application. The Medical Licensing Board may consider, as part of its determination of the clinical skills of the applicant, the following:

(i) medical research in an established research facility, hospital, university or private corporation;

(ii) specialized training or education;

(iii) publication of original work in learned, medical or scientific journals;

(iv) participation in federal, state, local or international public health programs or organizations;

(v) professional service in a federal, veterans or military medical institution,

(vi) such other professional activities as would maintain and enhance the clinical capabilities of the applicant.

(4) Any person granted a temporary license pursuant to Section 17 of this Act who shall satisfactorily complete a course of postgraduate clinical training and meet all of the requirements for licensure shall be granted a permanent license pursuant to Section 9.

(5) Notwithstanding any other provision of this Section, an individual holding a temporary license under Section 17 of this Act shall be required to satisfy the undergraduate medical and post-graduate clinical training educational requirements in effect or the date of their application for a temporary license, provided they apply for a license under Section 9 of this Act and satisfy all other requirements of this Section while their temporary license is in effect.

(B) Treating human ailments without drugs and without operative surgery. For the practice of treating human ailments without the use of drugs and without operative surgery:

(1) For an applicant who was a resident student and who is a graduate after July 1, 1926, of a chiropractic college or institution, that such school, college or institution, at the time of the applicant's graduation required as a prerequisite to admission thereto a 4 years' course of instruction in a high school, and, as a prerequisite to graduation therefrom, a course of instruction in the treatment of human ailments, of not less than 132 weeks in duration and which shall have been completed within a period of not less than 35 months except that as to students matriculating or entering upon a course of chiropractic study during the years 1940, 1941, 1942, 1943, 1944, 1945, 1946, and 1947, such elapsed time shall be not less than 32 months, such high school and such school, college or institution having been reputable and in good standing in the judgment of the Department.

(2) For an applicant who is a matriculant in a chiropractic college after September 1, 1969, that such applicant shall be required, as a prerequisite for admission to examination for licensure, to complete a 2 years' course of instruction in a liberal arts college or its equivalent, followed by a course of instruction in a chiropractic college in the treatment of human ailments, such course, as a prerequisite to graduation therefrom, having been not less than 132 weeks in duration and shall have been completed within a period of not less than 35 months, such college of liberal arts and chiropractic college having been reputable and in good standing in the judgment of the Department.

(3) For an applicant who is a graduate of a United States chiropractic college after August 19, 1981, the college of the applicant must be fully accredited by the Commission on Accreditation of the Council on Chiropractic Education or its successor at the time of graduation. Such graduates shall be considered to have met the minimum requirements which shall be in addition to those requirements set forth in the rules and regulations promulgated by the Department.

(4) For an applicant who is a graduate of a chiropractic

college in another country; that such chiropractic college be equivalent to the standards of education as set forth for chiropractic colleges located in the United States.

Amended by P.A. 85-1245, 1, eff. Jan. 1, 1989.